

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHAWN A. MILLS)	
Claimant)	
VS.)	
)	Docket No. 1,018,242
NEBRASKA FURNITURE MART)	
Respondent)	
AND)	
)	
EVEREST NATIONAL)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the September 24, 2004 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

Claimant alleges he injured his back while working for respondent on July 12, 2004. In the September 24, 2004 Order, Judge Howard granted claimant temporary total disability benefits and medical benefits.

Respondent contends Judge Howard erred. Respondent argues claimant is not credible and that he failed to prove he sustained accidental injury arising out of and in the course of employment. Consequently, respondent requests the Board to reverse the preliminary hearing Order and deny claimant's request for workers compensation benefits.

Claimant requests the Board to affirm the September 24, 2004 Order.

The only issue before the Board on this appeal is whether claimant sustained an accidental injury that arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

In July 2003, claimant began working for respondent. Claimant's job involved assembling and moving merchandise, which required lifting heavy items.

Claimant alleges that while working for respondent on July 12, 2004, he experienced a pop in his back when he picked up one end of a sofa sleeper. Claimant felt some back tension afterwards but continued his work. The next morning, claimant awoke with severe pain in his back and tingling and numbness in his left leg. Claimant testified he called Mark Wheeler, respondent's department supervisor, on July 13, 2004, and told Mr. Wheeler that he had hurt himself lifting a couch at work. Respondent sent claimant to see the company doctor.

Mr. Wheeler did not testify, but respondent's warehouse operations manager, Patrick Evers, testified by deposition. According to Mr. Evers, claimant was behind in productivity on July 12, 2004, and he discussed that with claimant during claimant's shift on that day. Mr. Evers testified claimant told him he was sore from work related to lawn mowing. Claimant denies speaking with Mr. Evers on July 12, 2004, and denies speaking with Mr. Evers about lifting a mower into his truck at home. Further, claimant denies hurting his back in that manner.

Mr. Evers admits, however, claimant did not say he had injured his back while performing work related to lawn mowing. Mr. Evers testified, as follows:

Q. (Mr. O'Connor) Now, isn't it true Mr. Mills [claimant] did not say on the evening of July 12th, 2004, when you saw him last around 8:00 that he had injured his back lifting a lawn mower in his private business, did he?

A. (Mr. Evers) He did not say he injured his back, no.¹

Exhibits from the preliminary hearing include a document from Employer Health Services dated July 13, 2004. The history taken states "no specific traumatic injury, but he does a lot of heavy lifting at work."²

The Board finds and concludes that claimant sustained an accidental injury that arose out of and in the course of his employment with respondent on July 12, 2004.

Judge Howard observed claimant testify at the September 2004 preliminary hearing and assessed claimant's demeanor and credibility. The Board notes the Judge impliedly found claimant to be a credible witness. After giving some deference to the Judge's

¹ Evers Depo. at 11.

² P.H. Trans., Resp. Ex. A.

assessment of credibility, the Board agrees the record taken as a whole supports claimant's position.

The Board finds claimant's testimony credible that he injured his back while working for respondent on July 12, 2004. The Board agrees with Judge Howard's implied finding that claimant sustained an accidental injury that arose out of and in the course of his employment with respondent. Accordingly, the September 24, 2004 preliminary hearing Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.³

WHEREFORE, the Board affirms the September 24, 2004 preliminary hearing Order entered by Judge Howard.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-534a(a)(2).